88-1248

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

ASSOCIATED MILK PRODUCERS, INC. and
MID-AMERICA DAIRYMEN, INC.,
Petitioners,

vs.

NATIONAL FARMERS' ORGANIZATION, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the established antitrust principle that the fact-finder may make a "just and reasonable estimate of the damage" caused by an antitrust violation:

(a) permits an antitrust plaintiff to prove the evidentiary basis for its damage estimate by less than "a preponderance of the evidence";

(b) allows an appellate court to shift to the defendant the burden of proof as to the measure of the plaintiff's damages; and

(c) permits an antitrust plaintiff to rely upon a damage theory that fails to exclude the effects of significant lawful competition?

2. Whether there is an "antitrust damages" exception to Rule 52(a) that permits an appellate court, based on its holding that the district court's findings rested on an "inappropriate legal standard" of proof, to review the record *de novo*, make its own witness credibility assessments and factual findings, and mandate an award of substantial damages, rather than remanding the case to the district court to reconsider its findings under the standard articulated by the appellate court?

This Petition presents only the foregoing two questions. Petitioners Associated Milk Producers, Inc. and Mid-America Dairymen, Inc. also adopt and incorporate by reference the two following questions presented in the companion Petition for Certiorari being separately filed by Central Milk Producers Cooperative:

1. Whether a national non-profit collective bargaining association of farmers which claims the right to engage in horizontal price-fixing on behalf of its members by reason of an antitrust exemption conferred by § 6 of the Clayton Act, 15 U.S.C. § 17, and the Capper-Volstead Act, 7 U.S.C. § 291, suffers "antitrust injury" when its future membership dues and marketing fees income is allegedly reduced by a conspiracy which interferes with the association's membership growth?

2. Whether proof of a properly defined relevant geographic market is necessary to show market power in a conspiracy to monopolize claim under § 2 of the Sherman Act or in a Rule of Reason conspiracy to restrain trade claim under § 1?

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rules 21.1(b) and 28.1, Petitioners state that in addition to the three parties named in the caption of this Petition, Central Milk Producers Cooperative and Associated Reserve Standby Pool Cooperative, Inc.[1] were parties defendant in the proceedings below. Central Milk Producers Cooperative is separately filing a companion Petition for Certiorari with this Court.

Petitioner Associated Milk Producers, Inc. states that it has no parent, subsidiary or affiliated companies within the meaning of Rule 28.1.

Petitioner Mid-America Dairymen, Inc. states that it has no parent or subsidiary companies within the meaning of Rule 28.1, but is affiliated with the following companies: Hiland Dairy Co., Sinton Dairy Foods Co., Gillette Dairy of the Black Hills, Roberts Dairy, Inc., and Western Foods Processing, Inc.

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1. The Eighth Circuit affirmed the District Court's dismissal of NFO's claims against ARSPC. *NFO II*, 687 F.2d at 1191, 1207, App. F at 257, 289.

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2. Petitioners adopt and incorporate the Appendix accompanying the companion Petition for Certiorari being separately filed by Central Milk Producers Cooperative. All citations to the Appendix, *e.g.*, "App. A at 1", refer to that separately bound **Appendix.**

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Associated Milk Producers, Inc. and Mid-America Dairymen, Inc. pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit in *National Farmers' Organization, Inc. v. Associated Milk Producers, Inc.*, 850 F.2d 1286 (8th Cir. 1988) (*"NFO IV"*).

OPINIONS BELOW

The four opinions[1] rendered by the courts below are reprinted in the Appendix and are officially reported as follows:

1. For convenience, each opinion will be referred to herein by its shorthand designation, *e.g.*, *"NFO IV,"* rather than by its full case name, followed by an official reporter citation and an Appendix citation when necessary.

National Farmers' Organization, Inc. v. Associated Milk Producers, Inc., 850 F.2d 1286 (8th Cir. 1988) (*"NFO IV"*), *reprinted in* App. B at 3. Review by writ of certiorari is sought as to this decision.

Alexander v. National Farmers Organization, 614 F. Supp. 745 (W.D. Mo. 1985) (*"NFO III"*), *reprinted in* App. E at 65.

Alexander v. National Farmers Organization, 687 F.2d 1173 (8th Cir. 1982) (*"NFO II"*), *cert. denied*, 461 U.S. 937 (1983), *reprinted in* App. F at 231.

In re Midwest Milk Monopolization Litigation, 510 F. Supp. 381 (W.D. Mo. 1981) (*"NFO I"*), *reprinted in* App. G at 297.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit issued its opinion and entered its judgment in *NFO IV* on July 5, 1988. Petitioners' timely Petition for Rehearing and Suggestions for Rehearing En Banc was denied on September 13, 1988. App. D at 63. Circuit Judges Bowman and Magill dissented from the denial of rehearing en banc. On December 3, 1988, Justice Blackmun granted petitioners an extension of time within which to file this Petition for Writ of Certiorari to and including January 26, 1989.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Statutes[2]

Section 1 of the Sherman Act, 15 U.S.C. § 1.

Section 2 of the Sherman Act, 15 U.S.C. § 2.

Section 4 of the Clayton Act, 15 U.S.C. § 15.

Rules

Fed. R. Civ. P. 52(a) provides in pertinent part:

> In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58 . . . . Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . . It will be sufficient if the findings of fact and conclusions of law . . . appear in an opinion or memorandum of decision filed by the court. . . .

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2. The pertinent text of the statutes involved in this case is reprinted in App. A at 1.

STATEMENT OF THE CASE

Background—*NFO I* and *II*

This 17-year-old private antitrust litigation arose out of competition for dairy farmer membership between respondent National Farmers Organization ("NFO"), a national, non-profit collective bargaining association of farmers, and petitioners Mid-America Dairymen, Inc. ("Mid-Am"), Associated Milk Producers, Inc. ("AMPI"), and Central Milk Producers Cooperative ("CMPC"), all three of which are Capper-Volstead agricultural cooperative milk marketing associations.

NFO asserted claims against Mid-Am, AMPI, and CMPC under Sections 1 and 2 of the Sherman Act, alleging unlawful monopolization, attempted monopolization and conspiracy to monopolize, restrain trade, and eliminate NFO as a competitor in the marketing of raw Grade A milk in a ten-state midwestern region of the United States.[3] The District Court held that NFO had failed to present sufficient evidence to establish petitioners' liability and dismissed each of NFO's claims. *NFO I*, 510 F. Supp. at 502-03, App. G at 548-51.

On appeal the Eighth Circuit affirmed the District Court's dismissal of NFO's actual and attempted monopolization claims. *NFO II*, 687 F.2d at 1191-92, App. F at 256-59. With respect to the District Court's dismissal of NFO's Section 2 conspiracy claim, however, the Eighth Circuit reversed. The Eighth Circuit held that petitioners had conspired to monopolize and eliminate NFO as a competitor in the marketing of raw Grade A milk produced

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3. Jurisdiction in the District Court was based on 28 U.S.C. § 1337 and 15 U.S.C. §§ 15 and 26.

in a ten-state midwestern region and cited "examples of conduct" and "specific overt acts" directed against certain independent dairies in furtherance of the alleged conspiracy. 687 F.2d at 1193, 1196-1204, App. F at 261-62, 266-83. The Eighth Circuit also held, however, that many of the acts alleged by NFO to be unlawful were in fact lawful. 687 F.2d at 1195, 1199-1200, 1206-07, App. F at 264-65, 274-75, 287-89.

The Eighth Circuit observed that "[i]n light of its ruling as to liability, the district court did not decide any question of [NFO's] standing to recover damages, the appropriateness of particular damage theories, or the amount of any damages", and that absent relevant factual findings on these critical and complex issues, remand was necessary. 687 F.2d at 1208, App. F at 291. The Eighth Circuit noted that additional factual findings were required to assess NFO's damage theories and determine the amount of its damages, if any, attributable to petitioners' unlawful conduct and stated that those matters "largely raise factual questions for the district court" on remand. 687 F.2d at 1209, App. F at 294.

NFO III—Proceedings on Remand

On remand to the District Court, NFO declined the opportunity to reopen the record and present additional evidence to support its claim for damages, electing instead to rely on the evidence presented and the damage theories advanced at the original trial. NFO described its damage theories as the "test market" and "market structure"[4]

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4. The District Court's rejection of NFO's "market structure" damage theory was affirmed by the Eighth Circuit in *NFO IV*, 850 F.2d at 1292 & n.3, App. B at 11. Therefore, that damage theory will not be discussed further.

approaches, both of which attempted to estimate NFO's lost membership dues and checkoff (or marketing) fees under a "failure to grow" theory.

Under its "test market" theory, NFO sought to use its performance in an identifiable portion (Federal Milk Market Order 68, encompassing Minneapolis-St. Paul, Minnesota and several surrounding counties) of a ten-state geographic area as a "yardstick" to measure its performance in the remainder of the area (comprising nine of the twenty-seven federal milk market orders located in that geographic area). The "market" in which NFO sought damages, *i.e.*, the market for *members*, was not, however, the same market in which the Eighth Circuit found unlawful restraints, *i.e.*, the market for the *sale of raw Grade A milk*.

The validity of NFO's "test market" theory turned on the reasonableness and accuracy of its underlying factual assumptions and whether the relevant conditions in the other nine damage orders were sufficiently similar to the conditions in Order 68 such that NFO's performance in Order 68 could fairly be extrapolated to the other orders so as to provide a "just and reasonable estimate" of NFO's damages. *NFO IV*, 850 F.2d at 1294-95, App. B at 16-18.

NFO supported its "test market" damage theory primarily through the testimony of its expert economist and three of its employees. Several critical factual assumptions provided by NFO's counsel served as the foundation for its expert's testimony regarding damage projections in the ten federal milk market orders. In an exhaustive review and analysis of NFO's damage theory in light of the record evidence, the District Court rejected each of these assumptions as "untenable" and concluded that they were not supported by reasonable and credible facts and inferences

in the record. *NFO III*, 614 F. Supp. at 757-93, App. E at 82-154.

The District Court specifically found and concluded "that a just and reasonable estimate of NFO's alleged lost market penetration damages cannot be made on any credible relevant data adduced by NFO and that any award of damages based on such a theory would necessarily be based on speculation and conjecture." *NFO III*, 614 F. Supp. at 792-93, App. E at 153. The District Court also analyzed NFO's damage theory with respect to the specific overt acts directed against various independent dairies as described by the Eighth Circuit in *NFO II* and concluded that NFO's damage theory that it lost membership dues and checkoff fees as a result of those acts was untenable and was not supported by reasonable and credible facts and inferences in the record. *NFO III*, 614 F. Supp. at 793-99, App. E at 154-67. Accordingly, the District Court awarded no damages to NFO on its Section 2 conspiracy claim and entered judgment thereon in favor of petitioners.

NFO IV

On appeal the Eighth Circuit again reversed, holding that NFO's "test market" theory was "a proper basis for a substantial damage award." *NFO IV*, 850 F.2d at 1292, App. B at 11-12. The Eighth Circuit justified its reversal on the erroneous premise that the District Court had used an "inappropriate legal standard" in rejecting NFO's damage theory and evidence. 850 F.2d at 1292, App. B at 12.[5] Relying on four Supreme Court

5. Although the Eighth Circuit seemingly concluded that the District Court's findings "would be clearly erroneous", [*sic*] *NFO IV*, 850 F.2d at 1294, App. B at 16, nowhere in its opinion did the Eighth Circuit explain the basis for its rejection of the District Court's factual findings as "clearly erroneous".

decisions for the principle that the fact-finder may make a "just and reasonable estimate of the damage", the Eighth Circuit held that the District Court should have applied a "lesser standard of proof" in analyzing NFO's theory and evidence of the amount of its damages. 850 F.2d at 1293, App. B at 13.[6]

Rather than remanding the case to the District Court for reconsideration and new findings under this "lesser standard of proof", the Eighth Circuit reviewed the record *de novo*. The Eighth Circuit engaged in its own independent factual and legal analysis of NFO's "test market" damage theory and reversed, often without explanation, the District Court's factual findings, including its credibility determinations, with respect to the critical assumptions on which NFO's damage theory was based. 850 F.2d at 1294-1308, 1312-13, App. B at 16-47, 57-58. The Eighth Circuit stated that a "review of the record and our prior opinion" in *NFO II* left it "with the definite and firm conviction that the amount of damages suffered by NFO as a result of the illegal conspiracy was substantial" and that "[t]he record simply will not support a finding that NFO is entitled to only nominal damages."

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6. The Eighth Circuit reasoned that the District Court had improperly rejected NFO's damage evidence in its entirety because certain portions of it rested upon proposed findings which the District Court had rejected in *NFO I*, and that the District Court should have independently reexamined NFO's damage evidence "in light of the lesser standard of proof applicable to determining the amount of damages." *NFO IV*, 850 F.2d at 1294, App. B at 16.

An examination of the District Court's opinion in *NFO III* clearly shows that, contrary to the Eighth Circuit's unsupported statement, the District Court conscientiously applied the proper legal standard in evaluating NFO's damage evidence. *See, e.g., NFO III*, 614 F. Supp. at 778 n.26 (citing *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946)), 791-93, App. E at 125-26, 151-53.

850 F.2d at 1308, App. B at 47. The Eighth Circuit concluded that "NFO's damage evidence, while not perfect, clearly establishes the basis for a significant award." 850 F.2d at 1294, App. B at 16.

The Eighth Circuit remanded the action to the District Court "for computation of the amount of damages" with explicit directions that the District Court "shall accept the 'test market' theory propounded by NFO as a valid base from which to determine the amount of damages and shall use the $7,403,374 claimed under the theory as a starting point." 850 F.2d at 1312, App. B at 57. The court allowed for certain reductions from NFO's damage figure if on remand it was determined that such reductions were supported by the existing record. 850 F.2d at 1312-13, App. B at 57-58.

REASONS FOR GRANTING THE WRIT

This case presents an example of an appellate court's blatant disregard of the limited scope of review permitted under Federal Rule of Civil Procedure 52(a). It also gives this Court an opportunity to clarify for the lower federal courts the interplay between Rule 52(a) and a line of cases from this Court holding that the fact-finder is permitted to make a "just and reasonable estimate of the damage based on relevant data" and "to act upon probable and inferential, as well as direct and positive proof." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 124 (1969).

The Eighth Circuit, in contrast to other Circuits, interprets this line of Supreme Court cases as allowing proof of the underlying evidentiary basis for the esti-

mate of antitrust damages by less than a "preponderance of the evidence." Its opinion suggests that this "lesser standard of proof" gives an appellate court more latitude than otherwise permitted under Rule 52(a) when reviewing a district court's findings regarding an antitrust plaintiff's proof of the amount of its damages.

The Eighth Circuit also interprets this line of cases as allowing an appellate court to shift to the defendant the burden of proof as to the quantum of damages and permitting an antitrust plaintiff to rely upon a damage theory that fails to exclude the effects of significant lawful competition and other lawful factors. If left to stand the Eighth Circuit's decision will encourage private antitrust litigation even though the plaintiff has no proof of actual measurable damages.

This Court should give plenary attention to the critical problems in the administration of private antitrust treble-damage claims that emerge from the Eighth Circuit's decision in this case.

I. THE EIGHTH CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH DECISIONS FROM OTHER CIRCUITS INTERPRETING SUPREME COURT DECISIONS REGARDING PROOF OF ANTITRUST DAMAGES AND CREATES CRITICAL PROBLEMS IN THE ADMINISTRATION OF ANTITRUST TREBLE-DAMAGE CLAIMS

A. The Eighth Circuit's Adoption of a "Lesser Standard of Proof"

The Eighth Circuit in *NFO IV* correctly stated that an antitrust plaintiff must prove: (1) that the defendant

violated the antitrust laws; (2) that the violation caused injury to the plaintiff; (3) that the injury was of a type sought to be prevented by the antitrust laws; and (4) the amount of the plaintiff's injury. The Eighth Circuit held that "[w]hile the first three of these elements must be established by a preponderance of the evidence, a lesser standard of proof is applicable to proof of the *amount* of damage." *NFO IV*, 850 F.2d at 1293, App. B at 13. The Eighth Circuit relied upon four decisions from this Court to support its adoption of this "lesser standard". *See J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); and *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931).

Fairly read, these decisions do not sanction proof of the underlying evidentiary basis for antitrust damage theories and estimates by less than a "preponderance of the evidence." They simply permit the fact-finder to make a "just and reasonable estimate of the damage based on relevant data" and "to act upon probable and inferential, as well as direct and positive proof." *Zenith Radio*, 395 U.S. at 124 (quoting *Story Parchment*, 282 U.S. at 564, and *Bigelow*, 327 U.S. at 264).

This Court was simply recognizing in those cases that the amount of an antitrust plaintiff's damages need not and often cannot be established with mathematical certainty or precision. The plaintiff still must present sufficient credible evidence, however, to enable the fact-finder to make a "just and reasonable estimate" of the actual damages sustained as a result of the antitrust violation. "Preponderance of the evidence" is the proper standard with respect to that underlying proof. *See J.*

Truett Payne, 451 U.S. at 568; *Zenith Radio*, 395 U.S. at 124; *see also Locklin v. Day-Glo Color Corp.*, 429 F.2d 873, 879 (7th Cir. 1970) (stating that an antitrust plaintiff "must prove the amount of damages by a preponderance of the evidence" and that "estimates based upon assumptions" must "rest upon an adequate base"), *cert. denied*, 400 U.S. 1020 (1971); *Bigelow v. RKO Radio Pictures, Inc.*, 150 F.2d 877, 883-84 (7th Cir. 1945) (stating that an antitrust verdict must be based "upon a preponderance of all the competent evidence" and that the amount of damages "may be reasonably approximated if based upon competent evidence"), *rev'd on other grounds*, 327 U.S. 251 (1946); *Garrett's v. Farah Manufacturing Co.*, 412 F. Supp. 656, 666 (D.S.C. 1976) (stating that the plaintiff "ha[s] the burden of proving by a preponderance of the evidence the amount of damages actually sustained as a result of the [antitrust] violation"); Fifth Circuit Pattern Jury Instructions, Civil Cases (1983) (stating that the fact-finder "should award an amount *shown by a preponderance of the evidence* in the case to be a just and reasonable sum sufficient to fairly and adequately compensate for the injury or damages sustained"), *reprinted in* 3 E. Devitt, C. Blackmar & M. Wolff, *Federal Jury Practice and Instructions* § 86.04, at 362 (4th ed. 1987) (emphasis added). The Fifth Circuit's Pattern Jury Instruction correctly recognizes that while the legal standard applied to the amount of damages is a "just and reasonable" estimate, the standard applied to the underlying evidentiary proof on which that estimate is based is a "preponderance of the evidence". The Eighth Circuit failed to recognize this distinction in *NFO IV*.

The Eighth Circuit's adoption of this "lesser standard" of proof permits an appellate court to usurp the function

of the fact-finder in violation of the commands of Rule 52(a). Even if an antitrust plaintiff's damage theory is rejected by the fact-finder because it is based upon inadequately supported factual assumptions and discredited testimony, the appellate court can apply the vague "lesser standard" and substitute its own contrary conclusions and inferences from a cold record. This "lesser standard", as evidenced by its application here, permits an appellate court to award substantial antitrust damages based solely upon its finding of an antitrust violation. *NFO IV*, 850 F.2d at 1293-94, App. B at 15-16. Such a result-oriented approach is contrary to the well-established antitrust principle that an antitrust violation alone does not mandate an award of substantial damages. *See J. Truett Payne*, 451 U.S. at 562; *Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc.*, 429 U.S. 477, 486 (1977); *Gray v. Shell Oil Co.*, 469 F.2d 742, 749 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973).

The Eighth Circuit's novel interpretation of this Court's decisions in *Story Parchment, Bigelow, Zenith Radio* and *J. Truett Payne* adds to the already significant confusion and uncertainty in the lower federal courts regarding the appropriate standard for proof of the amount of an antitrust plaintiff's damages. If left to stand, it will encourage the proliferation of private antitrust litigation and authorize substantial treble-damage awards in cases where, as here, there is no credible proof of actual, measurable damages. This case presents an excellent opportunity for this Court to resolve the split of authority in the Circuits and to clear up the confusion generated by this Court's prior decisions regarding the legal standards to be applied to an antitrust plaintiff's proof of the amount of its damages.

B. The Eighth Circuit's Shifting of the Burden of Proof

Presented with NFO's refusal on remand in *NFO III* to present additional evidence in order to provide the fact-finder a reasonable basis on which to estimate its alleged losses, the Eighth Circuit, relying upon its new "lesser standard of proof," simply shifted to petitioners the burden of proof on the amount of NFO's damages. The Eighth Circuit suggested that petitioners, as the defendants, should have presented evidence of a proper "yardstick" for measuring the amount of damages in order to remedy NFO's defective damage theory and evidence. *See, e.g., NFO IV*, 850 F.2d at 1296-97, 1301, App. B at 20-21, 32. In support of its holding the Eighth Circuit again relied upon this Court's decisions in *J. Truett Payne, Zenith Radio, Bigelow,* and *Story Parchment* for the proposition that petitioners had to bear the risk of uncertainty involved in NFO's damage theory.

Other Circuits, also relying on *Bigelow,* have rejected the notion that the uncertainty of the plaintiff's damages justifies a shifting of the burden of proof to the defendant. *See, e.g., Wells Real Estate, Inc. v. Greater Lowell Board of Realtors,* 850 F.2d 803, 816 (1st Cir.) (stating that "[a]lthough a private antitrust litigant is not required to prove the amount of its damages with mathematical certainty . . ., this guiding principle does not shift the burden of proof"), *cert. denied,* 109 S. Ct. 392 (1988); *Locklin v. Day-Glo Color Corp.,* 429 F.2d 873, 879 (7th Cir. 1970). There is an apparent split in the Circuits on this issue, however, as some courts have suggested that the burden of proof does shift to the defendant. *Cf. D & S Redi-Mix v. Sierra Redi-Mix and Contracting Co.,* 692 F.2d 1245,

1249 (9th Cir. 1982); *Klinger v. Baltimore & Ohio Railroad*, 432 F.2d 506, 516 (2d Cir. 1970).[7]

Review by this Court is necessary to resolve the confusion and apparent split of authority among the Circuits regarding the proper allocation of the burden of proof on the amount of an antitrust plaintiff's damages.

C. The Eighth Circuit's Acceptance of a Damage Theory That Failed to Account for the Effects of Lawful Factors

This case presents an important question regarding the proper interpretation of Section 4 of the Clayton Act, 15 U.S.C. § 15, and the necessary elements of an antitrust damage theory to support an award of substantial damages. Section 4 of the Clayton Act permits recovery for actual damages or injury "by reason of anything forbidden in the antitrust laws," but does not permit recovery for economic injury resulting from lawful conduct or causes not attributable to an antitrust violation.

The Eighth Circuit in *NFO IV* again relied upon the "just and reasonable" language in this Court's prior cases to hold that NFO's damage theory was not impermissibly

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7. The Eighth Circuit's shifting of the burden in *NFO IV* is inconsistent with its prior decision in *NFO II*, wherein it repeatedly emphasized NFO's burden on remand to prove its damage theory. *See, e.g., NFO II* at 1196 n.21, 1203 n.35, 1206-07, 1208, 1209 n.42, 1210, App. F at 37, 51, 58-59, 62-65. Moreover, the Eighth Circuit's shifting of the burden to defendants is fundamentally unfair in the circumstances of this case and mandates an impossible task on remand. Defendants now apparently must attempt to correct NFO's flawed damage theory on the *existing* record. NFO was afforded an opportunity on remand to the District Court in *NFO III* to reopen the record, but expressly declined to do so. Defendants, unaware that the Eighth Circuit would subsequently shift the burden to them, have been deprived of the opportunity to present additional evidence.

flawed simply because of its failure to account for lawful competition. *NFO IV*, 850 F.2d at 1305-08, App. B at 42-47.[8] The Eighth Circuit's holding conflicts with decisions of this Court and of other Circuits, and, if allowed to stand, would establish a dangerous precedent under which defendants would be required to pay substantial treble damages for completely lawful conduct.

This Court has held that antitrust damages cannot be based upon "speculation and guesswork", *Bigelow*, 327 U.S. at 264, and that a fact-finder may award damages only to the extent those damages are caused by defendants' wrongful acts and are "not shown to be attributable to other causes", *J. Truett Payne*, 451 U.S. at 566 (quoting *Bigelow*).

In contrast to the Eighth Circuit, the Second, Third, Fourth, and Ninth Circuits, also applying the *Bigelow* line of cases, uniformly have held that an antitrust damage theory that fails to take into account the effects of lawful competition is speculative as a matter of law and cannot form the basis of a "just and reasonable estimate" of damages. For example, in *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983), the Seventh Circuit determined that some of the acts for which the plaintiff sought to recover damages were law-

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8. Throughout this litigation NFO assumed, as part of its damage theories, that virtually every activity undertaken by defendants since the early 1960s was unlawful. Both the District Court and the Eighth Circuit held, however, that many of the challenged activities were entirely lawful. *See NFO II*, 687 F.2d at 1195, 1199-1200, 1206-07, App. F at 264-65, 274-75, 288-89; *NFO IV*, 850 F.2d at 1306 n.44, App. B at 43. NFO refused the opportunity to present additional evidence on remand to allow the District Court to adjust its damage theories and calculations to account for the effects of that lawful conduct.

ful. Because the plaintiff's evidence did not afford any basis for apportioning plaintiff's alleged losses between the lawful and unlawful acts, however, the Seventh Circuit reversed the district court's award of substantial damages, stating:

> When a plaintiff improperly attributes all losses to a defendant's illegal acts, despite the presence of significant other factors, the evidence does not permit [the fact-finder] to make a reasonable and principled estimate of the amount of damage. This is precisely the type of "speculation or guesswork" not permitted for antitrust injury verdicts. To allow otherwise would force a defendant to pay treble damages for conduct that was determined to be entirely lawful.

708 F.2d at 1162-63 (citing *Bigelow*); *see also United States Football League v. National Football League*, 842 F.2d 1335, 1378-79 (2d Cir. 1988); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1352-53 (3d Cir. 1975); *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, 828 F.2d 1033, 1043-45 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 1753 (1988); *Farley Transportation Co. v. Santa Fe Trail Transportation Co.*, 786 F.2d 1342, 1350-52 (9th Cir. 1985); *accord ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423, 435-36 (N.D. Cal. 1978), *aff'd sub nom. Memorex Corp. v. IBM Corp.*, 636 F.2d 1188 (9th Cir. 1980) (per curiam), *cert. denied*, 452 U.S. 972 (1981).

The rationale of these cases is sound. Section 4 of the Clayton Act permits recovery only for losses directly attributable to a defendant's unlawful conduct. *See J. Truett Payne*, 451 U.S. at 566. A damage theory that

attributes all of the plaintiff's alleged losses to all of the defendants' acts, as NFO's did here, despite the presence of substantial lawful competition and other lawful causes and factors not attributable to the antitrust violation, cannot as a matter of law form the basis of a reasonable and principled estimate of damages.[9] An appellate decision which permits such a damage theory to form the predicate for a potential multi-million dollar damage award turns the competition policy of the antitrust laws upside down and improperly compensates a plaintiff for what was in fact lawful competition.

II. THE EIGHTH CIRCUIT'S DECISION RAISES AN IMPORTANT QUESTION WHETHER AN APPELLATE COURT'S REVIEW OF A DISTRICT COURT'S ANTITRUST DAMAGE FINDINGS IS IMMUNE FROM THE COMMANDS OF RULE 52(a)

The Eighth Circuit totally ignored the District Court's extensive findings supporting its conclusion that there is no "credible" evidence that NFO suffered any injury entitling it to treble damages. As in *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 713 (1986), "nowhere in its opinion did the [Eighth Circuit] ever mention any of the factual findings of the district court, much less discuss or analyze them." Instead, the Eighth Circuit improperly reviewed the record independently and engaged in its own fact-finding in order to reach its own foregone conclusion that NFO's evidence "clearly estab-

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9. The issue is not simply one of damage measurement, as the Eighth Circuit suggested, but rather goes to the fundamental element of causation, inasmuch as losses resulting from lawful competition are not the type of antitrust injury for which recovery is permitted under § 4 of the Clayton Act. *See Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc.*, 429 U.S. 477, 489 (1977); *see also MCI*, 708 F.2d at 1161.

lishes the basis for a significant award." *NFO IV*, 850 F.2d at 1294, App. B at 16. Such appellate fact-finding conflicts with the plain language of Rule 52(a) and with this Court's decisions interpreting Rule 52(a) and clarifying the scope of appellate review thereunder.

Rule 52(a) provides that a district court's "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." In *NFO IV* the Eighth Circuit does not even mention Rule 52(a), much less attempt to comply with its commands.[10] Indeed, the Eighth Circuit blatantly violated the commands of Rule 52(a), as articulated by this Court in *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-75 (1985), in many critical respects. Here we note four of the more egregious examples:

1. The District Court found that Order 68 was not sufficiently comparable to the other damage orders to justify its use as a "yardstick" measure of NFO's performance. *NFO III*, 614 F. Supp. at 791, App. E at 151. The Eighth Circuit conceded that "NFO's yardstick measurement is not perfect", that "[t]he record contains evidence that [Order 68] was unique in several respects", and that there were "troublesome" differences between Order 68 and the other damage orders. *NFO IV*, 850 F.2d at 1295-96, App. B at 19-20. The Eighth Circuit, however,

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10. At one point in its opinion, the Eighth Circuit stated that "in light of our prior opinion [in *NFO II*] and the damage evidence adduced by the parties," the district court's finding that NFO offered insufficient proof to recover any damages "would be clearly erroneous." *NFO IV*, 850 F.2d at 1294, App. B at 16. If the Eighth Circuit intended that cryptic remark as a reference to the "clearly erroneous" standard of Rule 52(a), the reference is misplaced. It takes more than a prior appellate opinion or "evidence adduced by the parties" to make a district court's factual findings "clearly erroneous" within the meaning of Rule 52(a).

simply ignored the District Court's exhaustive and well-reasoned factual analysis for rejecting Order 68 as an appropriate "yardstick" and substituted its own judgment and version of the facts for that of the District Court.

2. The District Court expressly rejected NFO's proposed finding of fact and exhibit with respect to NFO's critical assumption of the number of NFO dairy farmers. The District Court found no credible factual support for NFO's assumption because NFO had no actual data to show the number of NFO dairy members in any state. *NFO III*, 614 F. Supp. at 763-65, App. E at 93-98. The Eighth Circuit simply ignored the District Court's findings and summarily concluded that under its "lesser standard of proof" NFO's use of these unsupported factual assumptions and the process by which NFO calculated its lost membership dues were "just and reasonable". *NFO IV*, 850 F.2d at 1301, App. B at 32.

3. The District Court rejected several of NFO's proposed factual findings and exhibits proffered to support NFO's allegation that Order 68 was a proper "yardstick" for measuring its damages because of its strong membership base on Order 68 and in the midwest generally. To support its contrary factual findings, the Eighth Circuit relied upon the direct testimony of three NFO employees without acknowledging that the District Court had rejected their self-serving testimony for lack of credibility.[11] *See NFO IV*, 850 F.2d at 1296 n.15, App. B at 22;

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11. With respect to another NFO assumption—that NFO would have entered all ten damage orders at staggered times within three years—the Eighth Circuit again relied upon the self-serving and unsupported testimony of these three NFO employees without acknowledging that their testimony had been rejected as not credible by the District Court. *NFO IV*, 850 F.2d at 1301-02, App. B at 33-34.

compare NFO III, 614 F. Supp. at 763-65, App. E at 93-98. The Eighth Circuit cited no extrinsic evidence to support its contrary factual findings on this point.[12]

4. The Eighth Circuit found "reasonable" NFO's "assumption" that it would achieve its alleged mature market share (10.5%) within three years. *NFO IV*, 850 F.2d at 1302, App. B at 34-35. The District Court, however, had rejected such an assumption, as well as NFO's expert's corollary assumption that market conditions would remain static, for lack of credible factual support and instead had credited the testimony of petitioners' expert on this issue. *NFO III*, 614 F. Supp. at 784-90, App. E at 137-150. The Eighth Circuit opined that the District Court's analysis on this issue was "flawed," and suggested that the District Court on remand could simply adjust NFO's damage theory calculation rather than rejecting it as speculative.

In setting aside these and other pivotal factual findings by the District Court, the Eighth Circuit blatantly exceeded the permissible scope of appellate review under Rule 52(a)'s "clearly erroneous" standard and ignored the commands of this Court that: (1) "appellate courts must constantly have in mind that their function is not to decide factual issues de novo"; (2) a district court's

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12. The factual assumptions discussed in paragraphs 2 and 3 above were critical to NFO's damage calculation under its "test market" theory. NFO's expert testified that the "most important" factor that he took into account to support his opinions regarding NFO's capability in the various market orders was NFO's assumed membership base in the various damage markets. *See NFO III*, 614 F. Supp. at 778, App. E at 125. The District Court found that NFO was unable to adduce any credible evidence regarding either its membership base in general or the number of dairy farmers who were active NFO members at any particular time. 614 F. Supp. at 764-65, 778, App. E at 94-98, 125.

findings cannot be set aside if they are "plausible in light of the record viewed in its entirety"; (3) a court of appeals may not reverse "even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently"; (4) "[w]here there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous"; and (5) an appellate court must give "even greater deference" to the district court's credibility determinations. *See Bessemer City,* 470 U.S. at 573-75.

The Eighth Circuit engaged in its own *de novo* review and fact-finding because in its view the District Court's findings were "tainted" by its failure to independently review NFO's damage evidence in light of the Eighth Circuit's "lesser [than preponderance of the evidence] standard of proof applicable to the amount of damages." *NFO IV,* 850 F.2d at 1294, App. B at 16.[13] Based upon its application of this "lesser standard of proof", the Eighth Circuit carved out an exception to the strictures of Rule 52(a) for findings regarding an antitrust plaintiff's proof of damages.

There is no precedent in this Court or in any other Circuit for the Eighth Circuit's "antitrust damages" exception to Rule 52(a). Indeed, such an exception conflicts with this Court's statement in *Pullman-Standard v. Swint,* 456 U.S. 273, 287 (1982), that Rule 52(a) "does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous" and with this Court's application of

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13. The Eighth Circuit's remedy was not a remand to the District Court to reconsider and make new findings in light of this standard, but rather to make its own appellate findings.

Rule 52(a) to a district court's findings regarding antitrust damage proof in *Zenith Radio*, 395 U.S. at 123-25.

Left unreviewed, the Eighth Circuit's decision in *NFO IV* would establish a confusing and dangerous precedent and create an "antitrust damages" exception to Rule 52(a) where none existed before. Review is necessary to reaffirm that Rule 52(a) applies to a district court's findings on all issues and in all cases.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ASSOCIATED MILK PRODUCERS, INC. and
MID-AMERICA DAIRYMEN, INC.,
Petitioners,

v.

NATIONAL FARMERS' ORGANIZATION, INC.,
Respondent.

CENTRAL MILK PRODUCERS COOPERATIVE,
Petitioner,

v.

NATIONAL FARMERS' ORGANIZATION, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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OPPOSITION BRIEF OF THE NATIONAL FARMERS' ORGANIZATION, INC.

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NATIONAL FARMERS' ORGANIZATION, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

OPPOSITION BRIEF OF THE NATIONAL FARMERS' ORGANIZATION, INC.

Respondent, The National Farmers' Organization, Inc. (NFO),[1] respectfully opposes the Petitions for Writ of Certiorari filed by Associated Milk Producers, Inc.

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[1] NFO has no parent or subsidiaries and has the following affiliates: NFO Members' CD&D Corporation; NFO Members' Meat Custodial Account, an Iowa Trust; NFO Members' Dairy Custodial Account, an Iowa Trust; NFO Members' Grain Custodial Account, an Iowa Trust.

(AMPI) and Mid-America Dairymen, Inc. (Mid-Am), and Central Milk Producers Cooperative (CMPC), to review the decision of the United States Court of Appeals for the Eighth Circuit finding that NFO has incurred substantial damages as a result of Petitioners' unlawful acts and remanding the case to the district court for further computation of damages and an award of appropriate attorneys' fees and costs.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at *National Farmers' Organization, Inc. v. Associated Milk Producers, Inc.*, 850 F.2d 1286 (8th Cir. 1988) (*"NFO IV"*) (3a).[2] The district court opinion is reported at *Alexander v. National Farmers' Organization*, 614 F. Supp. 745 (W.D. Mo. 1985) (*"NFO III"*) (65a). The prior Court of Appeals opinion finding that Petitioners had illegally conspired to monopolize Grade A milk marketing and to eliminate competition in the marketing of such milk is reported at *Alexander v. National Farmers' Organization*, 687 F.2d 1173 (8th Cir. 1982), *cert. denied*, 461 U.S. 938, 939 (1983) (*"NFO II"*) (231a). The initial district court opinion is reported at *In re Midwest Milk Monopolization Litigation*, 510 F. Supp. 381 (W.D. Mo. 1981) (*"NFO I"*) (297a).

STATEMENT OF THE CASE

This case and virtually all of the issues urged by Petitioners are before this court for the second time. Nearly eighteen years after the beginning of this case, it is now conclusively established that Petitioners, sellers of raw milk, engaged in a widespread antitrust conspiracy to eliminate competitive milk sellers, including NFO, and that Petitioners' conspiratorial conduct injured NFO. *NFO II*, 687 F.2d 1173 (231a); *NFO IV*, 850 F.2d

[2] Parallel citations to the printed Appendix will be in parentheses, e.g. "(3a)".

1286, 1312 (57a). In 1983 Petitioners sought certiorari to overturn the determinations of liability and injury, arguing essentially that NFO lacked standing under *Associated General Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), that the proof on relevant market was insufficient and that the Court of Appeals had improperly invaded the fact-finding province of the district court. Certiorari was denied. 461 U.S. 938, 939 (1983).

When the case was remanded to the district court for a computation of damages, that court determined that despite this Court's commands in cases such as *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), NFO had not provided any evidence from which any amount of damages could be estimated. *NFO III*, 614 F. Supp. 745 (65a). On appeal, however, the Court of Appeals held: (1) the district court used an inappropriate legal standard—requiring too high a degree of certainty—in rejecting NFO's damage evidence as insufficient; and (2) the evidence adduced by NFO satisfied the legal requirements of *Zenith* and thus provided an acceptable basis for estimating NFO's damages. *NFO IV*, 850 F.2d 1286 (3a). In so holding, the Eighth Circuit pointed out that AMPI had engaged in widespread destruction of relevant evidence, which would entitle the courts to draw adverse inferences on damage measurement and other issues in favor of NFO. *NFO IV*, 850 F.2d at 1307-1308 (46a).

The Court of Appeals concluded:

> "review of the record and our prior opinion establishing the fact of injury leave this court with a definite and firm conviction that the amount of damages suffered by NFO as a result of the illegal conspiracy was substantial. The record simply will not support a finding that NFO was entitled to only nominal damages."

850 F.2d at 1308 (47a). On remand, the Eighth Circuit has instructed the district court to use NFO's "test market" or "yardstick" damage figure as a starting point. That figure may be reduced by certain amounts specified in the Eighth Circuit's opinion. Additional adjustments are to be considered in accordance with guidelines prescribed by the Court of Appeals. 850 F.2d at 1313 (58a).

Petitioners now seek certiorari on grounds which largely parallel the arguments embodied in their certiorari petitions rejected in 1983.

REASONS THE WRITS SHOULD BE DENIED

I. THE "BURDEN OF PROOF" ISSUES ARE ILLUSORY AND UNWORTHY OF CERTIORARI

Recognizing the futility of seeking certiorari merely to review the facts in a particular case, Petitioners seek to transform their case and fact-specific appeal into a legal issue. They argue that the Court of Appeals adopted an incorrect standard of proof in its discussion of the "amount" of NFO's damages. *See* AMPI—Mid-Am Petition at 10-13. More specifically, Petitioners charge that the Court of Appeals somehow misread the landmark decisions in which this Court developed the basic distinction in private antitrust litigation between proving the "fact of injury" and the "amount of damages."

The Court of Appeals held that a private plaintiff who has established that it was injured by an antitrust violation "need only present evidence from which the fact finder may make a just and reasonable estimate" of the amount of damage "that is not based on speculation or guesswork . . . ." 850 F.2d at 1293 (14a). Petitioners do not take issue with this holding; they specifically agree with it, *e.g.*, AMPI—Mid-Am Petition at 9, 11, thereby underscoring the insubstantial—indeed, illusory—character of the "issues presented." [3]

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[3] The cynicism of Petitioners' argument about the inadequacy of NFO's damage proof, in view of what was done to conceal the

Emphasizing that "our prior opinion clearly established the fact of injury to NFO," a holding that Petitioners do not challenge, the Court of Appeals concluded that the district court, on remand, had failed to apply the proper standard of proof for determining the amount of damages. 850 F.2d at 1294 (16a). The settled distinction between the proof requirements applicable to the "fact" of damage and those applicable to the "amount" was spelled out by the Court of Appeals in an entirely orthodox discussion in which the opinion cited to and quoted liberally from this Court's controlling decisions. *Id.* at 1292-93 (12a-15a). At one point, the Court of Appeals noted that the fact of injury "must be established by a preponderance of the evidence," while "a lesser standard of proof is applicable to proof of the *amount* of damage . . . ." *Id.* at 1293 (13a). It is this reference to a "lesser standard of proof" that Petitioners would isolate from the Court's extended discussion and have this Court grant certiorari to review.

The fundamental distinction recognized by the Court of Appeals between the requirements for proving the *fact* of damage and proving the *amount* has one of the longest pedigrees in antitrust law. Beginning with *Story Parch-*

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facts here, is apparent. In an effort to frustrate NFO's pursuit of its claims against Petitioners, documents were burned in "admitted bonfires". *NFO II*, 687 F.2d at 1205 (286a). At the beginning of the case, AMPI ordered the destruction of evidence relating to NFO and antitrust issues, which resulted in the removal and burning of boxes and boxes of documents from AMPI's corporate planning headquarters.

Now Petitioners, seemingly unconcerned about this already-adjudicated obstruction of justice, in effect complain that they were unfairly deprived of the benefit of that evidence destruction. By urging this Court to require NFO to prove the amount of damages with unprecedented precision, in the face of this destruction of evidence that might have aided such proof, Petitioners propose a burden that is neither just nor reasonable. If there is ever going to be a worse case than this for this Court to speak to the issue of burden of proof, we cannot imagine it.

ment in 1931, this Court has repeatedly emphasized that an injured antitrust plaintiff, especially in a market foreclosure case such as this,[4] cannot be required to prove the amount of its damages with the precision that is required of its proof of the fact of injury. *See J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 565-67 (1981); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (1969); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562-66 (1931). That is the distinction to which the Court of Appeals referred in its observation about a "lesser standard of proof," an observation that Petitioners would elevate to a matter requiring this Court's review.

Other courts have used much the same language as the Court of Appeals to explain the distinction. Thus, in *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 435 (5th Cir. 1985), the Fifth Circuit noted that "an antitrust plaintiff must prove [the fact of injury] by a preponderance of the evidence," but "[o]nce the fact of damage has been established, plaintiff enjoys a relaxed burden with respect to the amount . . . ." *See also Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, 828 F.2d 1033, 1043 (4th Cir. 1987), *cert. denied*, 108 S.Ct. 1753 (1988) ("a lenient burden of proof" in establishing the amount of damages); *Fishman v. Wirtz*, 807 F.2d 520, 550 (7th Cir. 1987) (less "onerous a burden"); *Syufy Enterprises, Inc. v. American Multicinema, Inc.*, 793 F.2d 990, 1003 (9th Cir. 1986), *cert. denied*, 479 U.S. 1034 (1987) ("a less stringent standard of proof"); *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1297 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985) ("lesser

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[4] ". . . . Trial and appellate courts alike must also observe the practical limits of the *burden of proof* which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market . . . ." Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969), emphasis supplied.

quantum of proof" required to prove amount of damages).

Even Justice Powell, in an opinion for four members of this Court (and with which the remainder of the Court did not take issue), has used language very similar to that of the Court of Appeals:

> . . . the plaintiff has the burden of proving the fact of antitrust injury by a preponderance of the evidence . . . . Only when this fact has been proved may a court properly be lenient in the evidence it requires to prove the amount of damages . . . .

J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. at 570 (dissenting in part).

If Petitioners' point were well-taken, one would have to conclude that the Antitrust Section of the American Bar Association also has "misread" this Court's decisions. Thus, the Section has characterized the distinction, as did the Court of Appeals, in terms of a lesser burden of proof: ". . . The burden of proving the amount of damages is less than that required for proving the fact of damage . . . ." ABA, ANTITRUST LAW DEVELOPMENTS (SECOND) at 409 (2d ed. 1984). A leading commentator would appear to have fallen into the same error: ". . . once the facts of antitrust injury and of causation have been proven, the plaintiff thereafter has a much lesser burden to establish the monetary extent of that damage . . . ." 10 VON KALINOWSKI, ANTITRUST LAWS & TRADE REGULATION § 115.03[2][b] at 115-25 (1988). *See also id.* § 115.03[1][a] ("a lesser burden of proving the quantum of damages").[5]

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[5] Indeed, Petitioners themselves expressly conceded before the Court of Appeals, in language indistinguishable from the Court's, that a "lesser standard of proof [is] applicable to proof of the amount of antitrust damages sustained by NFO," Petition for Rehearing En Banc at 4, and proceeded to elaborate upon the distinc-

Petitioners' suggestion that the Court of Appeals misapprehended the purport of this Court's decisions and the distinction between proof of injury and damage is strikingly rebutted, moreover, by what the Court actually did with the NFO damage claims. For example, NFO had proffered two methods of estimating its damages: the "test market" and the "market structure" approaches, the latter of which produced a considerably higher damage figure. The Court of Appeals, however, while sustaining the "test market" method of proving the amount of damages, held that "the record will not support NFO's proffered damage computations based on the [alternate] market structure theory. . . ." 850 F.2d at 1292, n.3 (11a). Similarly, the Court: (a) rejected NFO's damage claim predicated upon earlier introduction of a "bargaining expense checkoff" because NFO's supporting evidence "simply lacks sufficient information to form the basis of the award NFO claims," *id.* at 1304 (40a); (b) rejected as inadequately supported by record evidence NFO's claim for "post-relief damages," *id.* at 1305 (41a); and (c) remanded to the district court yet other elements of NFO's claim, *id.* at 1303 (37a), 1305-07 (42a-46a).

Thus, it is clear that the Court of Appeals even-handedly adhered to the settled law that, once the fact of injury has been proved by a preponderance of the evidence, an "antitrust plaintiff need only present evidence from which the fact finder may make a just and reason-

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tion, again in language essentially the same as that used by the Court of Appeals:

> . . . while there generally is a more lenient application of the burden of proof to establish the amount of damages caused by antitrust violations, the burden remains nonetheless to establish by a preponderance of the evidence a causal connection between the defendant's wrongful conduct and the damages claimed . . . .

Id. at 20.

able estimate of the damage that is not based on speculation or guesswork . . . ." *Id.* at 1293 (14a).

In yet another effort to manufacture a "burden of proof" issue, Petitioners assert that the Court of Appeals somehow improperly shifted the burden when it suggested" that Petitioners "should have presented evidence of a proper 'yardstick' for measuring the amount of damages in order to remedy NFO's defective damage theory and evidence . . . ." AMPI and Mid-Am Petition at 14. Even putting aside the transformation of a "suggestion" into a "shift" in the burden of proof, Petitioners fail to explain why the matter would justify devoting the limited resources of this Court to its correction. It would be a ticket for this day and train only.

In any event, the Court of Appeals did not place the burden of proof upon Petitioners. To the contrary, as the opinion of the Court of Appeals makes abundantly clear, the Court held unequivocally that NFO's proof had established that Federal Milk Marketing Order 68 was sufficiently comparable to the "damage" markets to serve as a basis for a "just and reasonable" estimate of NFO's damages. *See* 850 F.2d at 1295-97 (19a-24a). Petitioners seize upon the Court's observation that Petitioners had "offered no reasonable substitute yardstick measurement . . . ." *Id.* at 1296 (21a). But this observation, which Petitioners have extracted from the Court's extended discussion of the adequacy of the test market approach, cannot reasonably be read as a "shifting" of the burden of proof. As the context shows, the Court was commenting upon Petitioners' trial strategy of presenting evidence that had nothing to do with the comparability of Order 68, but which purported to show that NFO had suffered no injury at all. *Id.* at 1296-97 (21a-24a).

Petitioners criticize the Court of Appeals, in this connection, for suggesting that Petitioners "had to bear the risk of uncertainty" in NFO's proof of the amount of its damages. AMPI and Mid-Am Petition at 14. Petitioners

have chosen the wrong target. The proposition in question originated with and is firmly embedded in *this* Court's decisions. As the Court noted in *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. at 265:

> The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. . . . That principle is an ancient one . . . .

Accord: *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. at 565; *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. at 566-67.

II. THE "EFFECTS OF LAWFUL COMPETITION" ARGUMENT IS INSUBSTANTIAL

Petitioners' argument concerning the "effects of lawful competition" (AMPI and Mid-Am Petition at 15-18) is simply baffling. The Eighth Circuit recognized the settled rule that antitrust damages are not recoverable if the violations did not contribute materially to them, and remanded the case to the district court to determine whether NFO's damage claim should be reduced to account for any losses resulting from Petitioners' lawful competition. 850 F.2d at 1307 (45a).[6] The Eighth Circuit provided the district court with guidelines to be considered as to whether, or to what extent, any such reduction should be made (*id.*), guidelines drawn directly from this Court's teachings in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566-67 (1981), *Story Parchment Co. v. Paterson Parchment Co.*, 282 U.S. 555 (1931) and *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

In short, Petitioners are being given the opportunity to litigate on remand the very issue they seek to raise.

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[6] Petitioners carry a significant burden in seeking a damage reduction based on this principle. Litton Systems, Inc. v. American Tel. & Tel. Co., 700 F.2d 785, 823 n.49 (2d Cir. 1983), cert. denied, 464 U.S. 1073 (1984).

Nonetheless, Petitioners ask this Court to grant certiorari, rather than allow the lower courts to determine whether any reduction in the NFO claim is appropriate.

Petitioners apparently seek to establish a rule that an antitrust victim must exclude all possible alternative causes of his loss, regardless of the fact that the unlawful conduct was a material cause of the loss, or else the victim is entitled to nothing. In other words, Petitioners would urge that the mere presence of some lawful acts means that a damage claim must be completely rejected. Such a rule would utterly vitiate the Clayton Act's damage remedy and, in any case, was squarely rejected in *Zenith Radio Corp. v. Hazeltine Research Inc.*, 395 U.S. at 114, n.9. *See also Perma Life Mufflers v. Int'l Parts Corp.*, 392 U.S. 134, 143-44 (1968) (White J., concurring) ("The plaintiff need not even show that the illegality was a more substantial cause than any other.") *Haverhill Gazette Co. v. Union Leader Corp.*, 333 F.2d 798, 805-06 (1st Cir.) *cert. denied*, 379 U.S. 931 (1964). This Court should not grant certiorari for the mere purposes of reaffirming the *Zenith* rule.

III. NFO, AS A DIRECT COMPETITOR OF PETITIONERS, AND A DIRECT TARGET OF THEIR PREDATORY CONSPIRACY, UNQUESTIONABLY HAS STANDING TO SUE

CMPC, joined by its co-Petitioners, has been arguing for 18 years that NFO lacks standing to sue.[7] Not surprisingly, the argument appears again here, in precisely

[7] At every turn, this preposterous argument has been rejected. CMPC raised an identical standing argument in its unsuccessful 1983 Petition seeking review of *NFO II*. Trying to breathe new life into this moribund argument, CMPC disingenuously refers to Associated General Contractors of California v. California State Council of Carpenters (*"AGC"*), 459 U.S. 519 (1983), as an "intervening decision." (CMPC Pet. at 8.) This is more than slightly inaccurate; *AGC* was the principal basis of CMPC's earlier petition, just as it is here.

the same form (CMPC Petition at 12-18), and it clearly deserves the same response.

It is established that Petitioners engaged in a predatory conspiracy to eliminate their competitors and that NFO, one of their most significant competitors, was a principal target because NFO undercut Petitioners' milk prices. Where Petitioners succeeded in eliminating NFO, as in Chicago, they raised prices. 687 F.2d at 1198-99. As held by both the district court and the Court of Appeals, NFO, as a competitor of Petitioners and a direct target of their conspiracy, unquestionably has standing to sue. 687 F.2d at 1209 (293a-294a); 614 F. Supp at 751 (69a). *See* 2 AREEDA & TURNER, ANTITRUST LAW ¶ 340a (1978) ("such standing is so clear it is seldom challenged . . ."); *TV Signal Co. of Aberdeen v. American Telephone & Telegraph Co.*, 617 F.2d 1302, 1309 (8th Cir. 1980) ("plaintiff has amply demonstrated standing since it was both a competitor and a potential competitor").

The cases upon which Petitioners' standing argument is based—*Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*"), and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)—confirm NFO's standing to sue.

In *AGC*, a labor union complained that a contractors' association had coerced third parties to utilize non-union contractors, thereby diverting business from certain unionized contractors and, in turn, indirectly disadvantaging the union. Commenting that the plaintiff's alleged injuries were "unspecified," "remote and obviously speculative" and "indirect," 459 U.S. at 539-40, 545 n.52, the Court held that the union lacked standing to sue. The Court emphasized that "the union was neither a consumer nor a competitor in the market in which trade was restrained" (*id.* at 539), and further, that the union was not "a direct victim of the Petitioners' coercive prac-

tices." *Id.* at 540 n.44. The Court also commented that "denying the union a remedy on the basis of its allegations in this case is not likely to leave a significant antitrust violation undetected or unremedied." *Id.* at 542.

The instant case is completely different. NFO was both a "competitor in the market in which trade was restrained" and "a direct victim of Petitioners' coercive practices." Petitioners are really saying that NFO's injuries were "indirect" because Petitioners injured NFO by depriving it of member-suppliers and of markets. It is difficult to see how conspirators could directly injure their competitor any way *other* than by cutting the competitor off from suppliers and customers. *See, e.g., Klor's, Inc. v. Broadway Hale Stores, Inc.*, 359 U.S. 207 (1959).

Confirming the absurdity of Petitioners' position, the Supreme Court in *AGC* held that the persons whose position was identical to NFO's—contractors from whom business had been diverted as a result of illegal coercion —*would* have been entitled to sue. 459 U.S. at 541. Moreover, denying NFO standing to sue would clearly "leave a significant antitrust violation . . . unremedied," allowing Petitioners to go scot free after successfully choking off competition in a basic food commodity. *AGC*, in short, provides no support for CMPC's position.

Citing *Brunswick*, where the Court denied standing to a plaintiff complaining about losses that it claimed to have suffered because of reduced prices resulting from increased competition, Petitioners claim that NFO has not suffered "antitrust injury," *i.e.*, "injury of the type the antitrust laws were designed to prevent." (CMPC Petition at 15.) The instant case, however, is the reverse of *Brunswick*. NFO was injured by Petitioners' conpiracy to *eliminate* competition, including NFO, in order to *raise* prices. This clearly constitutes "antitrust injury." [8]

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[8] The present case thus does not, as Petitioners claim (CMPC Petition at 18), provide an opportunity for this Court to decide the

IV. THE EIGHTH CIRCUIT FULLY ADHERED TO RULE 52(a)

Petitioners argue that the Eighth Circuit violated Rule 52(a), Fed. R. Civ. P., and engaged in *de novo* review in rejecting the district court's finding that NFO presented no evidence sufficient to support a damage award. AMPI and Mid-Am Petition at 18-23. On the contrary, the Eighth Circuit has scrupulously adhered to the requirements of Rule 52(a) throughout this litigation.

In *NFO II*, where the Court of Appeals reversed the district court's liability findings, it explicitly applied the required "clearly erroneous" test, and specifically noted that, "In looking at the evidence underlying the findings, we do not contemplate a *de novo* review." 687 F.2d at 1199 (273a). In *NFO IV*, the Court of Appeals similarly applied the "clearly erroneous" test and, as mandated by this Court,[9] looked at the evidence as a whole:

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issue left open in *AGC*: "Whether the direct victim of a boycott, who suffers a type of injury unrelated to antitrust policy may recover damages when the ultimate purpose of the boycott is to restrain competition in the relevant economic market." 459 U.S. at 540-41 n.44. Here, NFO's injury—resulting from Petitioners' conspiracy to eliminate competition in order to raise prices—goes to the very *core* of antitrust policy. Similarly misplaced is the claim (CMPC Petition at 17) based on *Brunswick* and *AGC* that NFO lacks standing because, as an agricultural cooperative, it tries to achieve higher prices for its members. NFO in this case is *not* seeking to use the antitrust laws to promote higher prices through *lessened* competition, as in *Brunswick*. Instead, NFO has invoked the antitrust laws for the reason they were created: to redress injuries caused by Petitioners' unlawful interference with NFO's right to compete.

[9] In United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948), the Court held that "a finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

> [T]he district court's . . . finding that NFO offered insufficient proof to recover any damages [is] . . . clearly erroneous
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> * * * *
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> [V]iewed as a whole, the record simply does not support the district court's rejection of NFO's damage evidence in its entirety . . .

NFO IV, 850 F.2d at 1294 (16a), 1303 (37a).

Since the Court of Appeals did purport to apply a straightforward and traditional "clearly erroneous" test, as even Petitioners grudgingly admit, AMPI and Mid-Am Petition at 19, n.10, then what Petitioners are asking for is not the clarification of an important legal issue, but rather that this Court review the record of an eighteen-year-old case that took two years to try and decide whether it concurs in the way the Court of Appeals applied the test to this particular collection of evidence.

There are, in addition, unique circumstances present here which would make the review of this particular case from a Rule 52(a) standpoint of little precedential value. The "findings" to which deference is sought were hundreds of formula "Rejections" of NFO's proposed findings, confessedly devoid of any articulation as to their basis. *NFO I*, 510 F. Supp. at 442, n.28. (419a) These "Rejections" in turn, provided the basis of much of *NFO III*, 614 F. Supp. at 762 (91a), hardly presenting an exemplar of the kinds of findings meriting Rule 52(a) deference.

The presence of any significant Rule 52(a) issue at all is also dubious. The damage evidence was largely composed of statistics compiled by the Federal Government, admissions by Petitioners and undisputed matters of history such as, for example, the fact that NFO, Inc. did achieve a 10.5% market share in the test market. Consequently, the district court's "no damages" holding was simply a general conclusion that, as a matter of law, the evidence, most of its unrebutted, did not provide a reasonable basis for estimating damages.

Moreover, while it reversed the district court, the Court of Appeals did *not* finally resolve all damages-related facts. Instead, even though NFO had been victimized by the widespread destruction of evidence described under Point I, it remanded for further findings on a number of issues, while providing guidance as to the standards that should be applied. This obviously does not reflect *de novo* appellate fact finding. Instead, the Eighth Circuit performed the classic and appropriate appellate functions.

Petitioners' Rule 52(a) argument thus amounts to little more than a quibble over the evidence, a subject completely unsuitable for certiorari review.

V. THE EIGHTH CIRCUIT'S HOLDING THAT ELABORATE RELEVANT MARKET PROOF IS UNNECESSARY FOR PREDATORY HORIZONTAL CONSPIRACIES CREATES NO CIRCUIT CONFLICTS AND RAISES NO IMPORTANT ISSUES FOR REVIEW

In *NFO II*, the Eighth Circuit held that Petitioners had engaged in a predatory horizontal conspiracy to eliminate all competitors in a ten-state region in the Midwest in violation of both § 1 and § 2 of the Sherman Act. The court held that proof of a predatory horizontal conspiracy only requires "a minimal showing . . . as to the product and geographic context of the alleged conspiracy," and that "rigorous" proof of a "relevant market" is not necessary. 687 F.2d at 1193 (260a). According to Petitioners, the failure to require "rigorous" relevant market proof creates a "major conflict among the circuits." (CMPC Petition at 19.)

Of course, the Eighth Circuit *did* require proof of a relevant market. *NFO II*, 687 F.2d at 1193. Thus, the only conceivable issue is whether it required enough proof in the circumstances of this particular case. The benefit of having this Court review the record and embroil itself in the fact-specific issue of whether the Court

of Appeals properly evaluated the relevant market evidence is never explained.

There is, moreover, no conflict among the circuits.[10] Petitioners have simply confused cases arising under the rule of reason with cases involving *per se* illegal conduct. No court has ever required elaborate relevant market proof when faced with the kind of *per se* illegal horizontal predation involved in this case.

A. Petitioners Engaged In Horizontal, Per Se Illegal, Concerted Predatory Practices

The linchpin of Petitioners' entire argument is the repeated but unexplained assertion that Petitioners' conduct constituted a "Rule of Reason conspiracy." (CMPC Petition at 19, 20, 25, 27.) This is nonsense. Petitioners' activities were clearly *per se* illegal. As held in *NFO II*, Petitioners engaged in a horizontal conspiracy using raw predation explicitly intended to eliminate all competition, including NFO, in order to raise prices. The conspiratorial conduct included discriminatory pricing, coercive supply disruptions and bad faith litigation, *NFO II*, 687 F.2d at 1193 (261a-262a), and was found to be "predatory on its face". *Id.* at 1199 (273a).

The characterization of this type of naked, anticompetitive conspiracy as being subject to a "Rule of Reason" defense is remarkable. In fact, the conspiracy found here constituted a classic *per se* Sherman Act violation, drawn straight from the pages of prior unanimous decisions of the Supreme Court. *United States v. General Motors Corp.*, 384 U.S. 127, 145 (1966) ("Elimination, by joint collaborative action, of discounters from access to the market is a *per se* violation of the Act."); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (group

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[10] In its first time around seeking certiorari, CMPC argued the very same, "conflict in the circuits" point and got not a single vote. 461 U.S. 938. The argument has not improved with age.

boycott involving discriminatory pricing and concerted refusal to deal is *per se* illegal under both §§ 1 and 2 of the Sherman Act); and *United States v. Borden Co.*, 308 U.S. 188 (1939) (criminal conspiracy—involving, incidentally, one of AMPI's constituent cooperatives—to fix prices and eliminate competition).[11] Petitioners' conduct thus required no rigorous relevant market analysis to asses sits competitive significance. It was inherently and intentionally destructive of competition.

B. No Appellate Court Has Ever Required Rigorous Relevant Market Proof In A § 2 Horizontal Conspiracy Case Involving Concerted Predatory Practices Intended To Destroy Competitors

Stretching to create a circuit conflict, Petitioners ignore the facts in the cases. Every appellate decision cited by Petitioners as requiring rigorous relevant market proof involved ordinary rule of reason-type allegations. Some were garden-variety dealer termination claims. The defendants' conduct in these cases had ambiguous competitive significance unless analyzed in a structural setting.[12] On the other hand, rigorous relevant market

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[11] The Court of Appeals referred to Petitioners' activities as "concerted predatory conduct" without affixing the latin label "per se." However, as the court noted (687 F.2d at 1192 n.16 (260a)), "concerted predatory conduct . . . is 'unreasonable' under Section 1 regardless of whether the *per se* label is attached." For example, in *Klor's*, the classic group boycott case, this Court treated the boycott as *per se* illegal without ever actually using the talismanic phrase, *"per se."*

[12] Petitioners cite (CMPC Petition at 20 and n.19) § 2 conspiracy cases in the Third, Fourth, Fifth, Eleventh and D.C. Circuits as requiring relevant market proof. The holdings in a number of these cases are ambiguous at best, reflecting a commentator's observation that "often . . . the [§ 2] conspiracy allegation appears to be no more than an afterthought . . . and it seldom gets the court's attention." 3 AREEDA & TURNER, ANTITRUST LAW ¶ 839 at 358 (1978). Nevertheless, *each* of these cases involved rule of reason-type offenses that would clearly require relevant market proof, even

proof has *never* been required in any case like this one involving horizontal concerted predatory practices revealing on their face a specific intent to destroy all competition and control prices.

This consistent distinction is best expressed in *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 926-27 (9th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981):

> [N]o particular level of market power or "dangerous probability of success" has to be alleged or proved in a conspiracy claim where the specific intent to monopolize is otherwise apparent from the character of the actions taken. [Citations omitted.] But where actions are ambiguous, the existence and extent of market power may make the inference of specific intent from conduct more or less plausible. [Citations omitted.]

See SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST at 139-40 (1977); 3 AREEDA & TURNER, ANTITRUST LAW ¶ 839 at 358-59 (1978) ("where the agreements involved would also be held to offend § 1 without the necessity of proving power, the failure to require it for the § 2 conspiracy offense is understandable").

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under § 1. Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139, 148 (3d Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982) (challenged vertical exclusive dealing contracts were "examined under the rule of reason"); American Football League v. National Football League, 323 F.2d 124, 132 (4th Cir. 1963) (joint venture rule of reason analysis focusing extensively upon defendant's business justifications); Associated Radio Service Co. v. Page Airways, Inc., 624 F.2d 1342, 1348 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981) (business tort-type conduct explicitly held subject to rule of reason); Bill Beasley Farms, Inc. v. Hubbard Farms, 695 F.2d 1341, 1343 (11th Cir. 1983) (vertical distribution rule of reason analysis); Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418, 420 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957) (vertical distribution rule of reason analysis).

In *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2d Cir. 1961),[13] as in all other cases involving horizontal, concerted predation, relevant market proof was held unnecessary because the very nature of defendants' conduct established proof of specific intent to monopolize, the key element in a § 2 conspiracy case:

> [W]here the charge is conspiracy to monopolize, the essential element is not the power, but the specific intent to monopolize.
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> * * * *
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> [T]he defendants took concerted action to drive independent non-cooperative linen suppliers out of business. In our opinion this was sufficient to support the conclusion that Petitioners had the specific intent to monopolize.

Id. at 573. *See, also, United States v. Yellow Cab Co.*, 332 U.S. 218, 226 (1947) (use of competition-stifling practices that "have been condemned time and again as violations of the [Sherman] Act"; held: no relevant market required); *United States v. National City Lines*, 186 F.2d 562 (7th Cir.), *cert. denied*, 341 U.S. 916 (1951) (criminal conviction).[14] *Accord*: *United States*

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[13] Petitioners suggest that Karlinsky v. New York Racing Ass'n, 517 F.2d 1010, 1011 (2d Cir. 1975), somehow conflicts with the Second Circuit's earlier *Consolidated Laundries* decision. *Karlinsky*, however, involved no concerted predatory practices as in *Consolidated Laundries* and here, but instead only vague allegations of ambiguous violations, which the court summarily dismissed as frivolous. ("Brevity is dictated by the frivolity of the litigation.") (*Id.*)

[14] Petitioners erroneously suggest (CMPC Petition at 21, n.20) that *National City Lines* was overruled by the Seventh Circuit in Ball Memorial Hospital v. Mutual Hospital Insurance, 784 F.2d 1325 (7th Cir. 1986). However, *National City Lines* was nowhere cited in *Ball Memorial*; more importantly, *Ball Memorial* addressed single firm monopolization and attempted monopolization, *not* a conspiracy to monopolize. CMPC also relies (*id.*) on a district court decision in the Seventh Circuit that purportedly "criticized" *National*

v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395 n.23 (1956). Here too, as in *Consolidated Laundries*, there was no ambiguity in Petitioners' concerted action; it was taken for the specific purpose of eliminating NFO and *all* competing milk sellers, for the explicit purpose of raising prices. No appellate court confronting such clear malevolent intent, and concerted horizontal predation, has ever required elaborate relevant market proof in a § 2 conspiracy case.

We would note, moreover, that in any event, the evidence of relevant market and Petitioners' power in this case would more than satisfy any requirements for such evidence even in § 2 rule of reason cases. The Eighth Circuit clearly found raw Grade A milk to be the relevant product market and found the geographic target of the conspiracy to be a "ten-state region" of the Midwest (687 F.2d at 1191, 1193) (208a, 261a). The ten states as revealed in the pleadings are: Wisconsin, Minnesota, Nebraska, Iowa, Illinois, Missouri, Kansas, Oklahoma, Arkansas, and Texas. This is the *same* relevant market alleged by Mid-Am in its original and five amended complaints against NFO, thus constituting a conclusive judicial admisison. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 265 (2d ed. 1972); 9 WIGMORE, EVIDENCE § 2589 (Chadbourn rev. 1981). Further, the Eighth Circuit said that Petitioners "do not deny having . . . significant market power" and that "we . . . are pre-

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City Lines. Tire Sales Corp. v. Cities Service Oil Co., 410 F. Supp. 1222, 1231-32 (N.D. Ill. 1976), *rev'd*, 637 F.2d 467 (7th Cir. 1980), *cert. denied*, 451 U.S. 920 (1981). CMPC's citation and discussion of this decision fail to indicate that it was *reversed* by the Seventh Circuit! The Seventh Circuit never dealt with the § 2 conspiracy issues because they were voluntarily withdrawn by the parties. In any event, while suggesting that proof of relevant market should be required where vertical distribution practices are challenged under § 2 of the Sherman Act, the district court recognized that *horizontal* conspiracies did *not* necessitate proof of relevant market. *Id.* at 1232 n.12.

sented with the certainty, on this record, that AMPI, CMPC, and Mid-Am are the major marketers of raw milk produced in the Midwest . . . ." (687 F.2d at 1192.) (259a) The only unresolved question found by the court was the precise level of Petitioners' market shares—a significant issue in § 2 actual, and perhaps attempted, monopolization cases, but irrelevant in § 2 conspiracy cases.

C. The § 2 Relevant Market Requirement Does Not Present An Important Antitrust Issue

As a further reason to deny review, a ruling upon the relevant market question raised by CMPC would be largely unimportant both in this case and in antitrust law generally. As the Eighth Circuit noted, citing *Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458, 463 (1960), the same predatory conspiracies may violate *both* § 1 and § 2 of the Sherman Act, and here, the Eighth Circuit in fact held Petitioners liable to NFO for violating both, through the same predatory conduct. The law is absolutely clear that horizontal, concerted predatory practices, like those of Petitioners in this case, violate § 1 without necessity to prove relevant market. Thus, even if this Court were to grant the petition and review the § 2 conspiracy finding, Petitioners would *still* be fully liable to NFO under § 1.

Professor Areeda, who devotes less than two pages of his eight volume antitrust treatise to § 2 conspiracies, makes the same point:

> Any arrangement that could be considered a combination or conspiracy to monopolize must necessarily also be an unreasonable restraint of trade offending § 1. To be sure, not all § 1 violations would constitute conspiracies to monopolize. But the key point is this: every combination or conspiracy that offends antitrust policy can easily be held to be an unreasonable restraint or trade, without the need for consid-

> ering the additional complexities that flow from using the § 2 monopoly concept. *There is therefore no need whatever to try to define the content of the § 2 conspiracy.* [Emphasis added.]

3 AREEDA & TURNER, ANTITRUST LAW ¶ 839 at 358 (1978). Thus, NFO submits that the § 2 conspiracy issue raised by Petitioners simply does not present a significant antitrust issue worthy of this Court's plenary consideration.

CONCLUSION

For all of the above reasons, AMPI's, Mid-Am's and CMPC's Petitions for writ of Certiorari should be denied.

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No. 88-1248

In the Supreme Court of the United States

OCTOBER TERM, 1988

ASSOCIATED MILK PRODUCERS, INC. and
MID-AMERICA DAIRYMEN, INC.,
Petitioners,

vs.

NATIONAL FARMERS' ORGANIZATION, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Petitioners Associated Milk Producers, Inc. ("AMPI") and Mid-America Dairymen, Inc. ("Mid-Am") respectfully submit this reply to the Opposition Brief ("Opp. Br.") of respondent National Farmers' Organization, Inc. ("NFO").

THE EIGHTH CIRCUIT'S DISREGARD OF RULE 52(a)

NFO's response to the important issue presented by the Eighth Circuit's complete disregard of the commands of Rule 52(a) mischaracterizes the record, ignores the credibility determinations and other de novo factual findings made by the Eighth Circuit, and ignores the leading decision of this Court regarding the scope of appellate review under Rule 52(a).

1. In *NFO IV* the Eighth Circuit violated virtually all of the cardinal commands regarding the scope of appellate review under Rule 52(a). The most egregious example is the Eighth Circuit's reversal of the District Court's credibility findings. In *NFO III* the District Court had rejected as not credible the unsupported testimony of three NFO employees, upon which NFO had relied to support at least two factual assumptions critical to its damage theory. *See* Petition for Certiorari ("Pet.") at 20. The Eighth Circuit simply ignored the District Court's credibility findings and in a *de novo* review of the record proceeded to rely upon the discredited testimony of these witnesses to support its ultimate finding that NFO had suffered substantial damages. The Eighth Circuit cited no extrinsic evidence to support its contrary factual findings and never mentioned the District Court's credibility findings. Rule 52(a) demands "even greater deference" to a trial court's findings when they are based upon the credibility of witnesses. *Anderson v. City of Bessemer City,* 470 U.S. 564, 575 (1985). Nowhere in its brief does NFO address this issue.

2. NFO simply is wrong in stating that the District Court's factual findings were merely conclusory and therefore not worthy of the appellate deference required by Rule 52(a). Opp. Br. at 15. The District Court made specific and extensive findings of fact on all damage issues, damage theories and underlying assumptions. *See NFO III,* 614 F. Supp. 745, 758-804; App. E at 82-167. NFO's contention that its damage evidence was "largely" composed of statistics and "undisputed" matters of history also ignores the record. Opp. Br. at 15. NFO's damage model was based upon numerous factual assumptions, nearly all of which the District Court rejected

after careful analysis for lack of credible evidentiary support. *See* Pet. at 20.

3. In *NFO IV* the Eighth Circuit completely ignored the standards announced in *Bessemer City,* the leading Rule 52(a) decision. If left unreviewed, the Eighth Circuit's opinion in *NFO IV* would create an unprecedented exception to the Rule 52(a) standards for antitrust damage proof.

THE EIGHTH CIRCUIT'S ADOPTION OF A "LESSER STANDARD OF PROOF" AND ITS SHIFTING OF THE BURDEN OF PROOF TO PETITIONERS

1. The Eighth Circuit, relying upon an erroneous interpretation of four decisions from this Court, adopted a "lesser standard of proof" than "preponderance of the evidence." Pet. at 10-13. The Eighth Circuit's adoption and application of this new standard in *NFO IV* permits an appellate court to usurp the function of the fact-finder, in violation of Rule 52(a), by substituting its own contrary factual conclusions and inferences from a cold record and awarding substantial antitrust damages based solely upon its finding of an antitrust violation. Pet. at 13.

NFO completely ignores this crucial point in its brief and does not address the glaring inconsistency between the Eighth Circuit's new "lesser standard of proof" and the strictures of Rule 52(a) and elementary principles of antitrust law. Indeed, this new "lesser standard" effectively relieves an antitrust plaintiff of the burden of proving a causal nexus between the defendant's wrongful conduct and the damages claimed.

2. The question raised in this case (in which the District Court found no credible evidence of antitrust injury or damage but the Eighth Circuit independently found sufficient evidence of substantial damages) concerns the quantum and quality of proof necessary to provide an evidentiary basis for a "just and reasonable" damage estimate. This Court has held that an antitrust damage award must be more than mere "speculation or guesswork," *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 124 (1969), that it must be "based on relevant data," *id.*, and that the plaintiff's evidence must be "sufficient to support a jury [or fact-finder] award even under our relaxed damage rules," *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 567 (1981).

This Court has never addressed the very practical evidentiary and proof problems presented in this case. NFO claims (Opp. Br. at 6-7) that several Circuits have held that a standard less than a preponderance suffices, although how much less is not made clear. On the other hand, Petitioners have cited (Pet. at 12) several Circuit decisions to the effect that the antitrust plaintiff must prove the amount of its damages by a preponderance of the evidence. *See, e.g., Locklin v. Day-Glo Color Corp.*, 429 F.2d 873, 879 (7th Cir. 1970). This conflict among the Circuits alone warrants review by this Court to resolve important and recurring problems in antitrust cases.

3. NFO takes inconsistent positions regarding the Eighth Circuit's shifting of the burden of proof. First, NFO contends that the Eighth Circuit "did not place the burden of proof upon Petitioners." Opp. Br. at 9. Later, however, NFO states that "[P]etitioners carry a

significant burden in seeking a damage reduction" based upon the effects of lawful competition. *Id.* at 10 n.6. These inconsistent positions highlight both the confusion resulting from the Eighth Circuit's opinion and the need for clarification by this Court.

THE FAILURE TO ACCOUNT FOR THE EFFECTS OF LAWFUL COMPETITION

1. In contrast to at least five other Circuits, the Eighth Circuit did not reject a damage theory that did not exclude the effects of significant lawful competition and instead shifted the burden to Petitioners to prove the basis for and the amount of an adjustment for lawful conduct. Pet. at 15-18. NFO's brief fails to address this conflict among the Circuits.

2. NFO suggests that Petitioners are advocating a rule whereby "the mere presence of some lawful acts" requires complete rejection of a damage claim. Opp. Br. at 11. Petitioners advanced no such rule. This case does not involve "the mere presence of some lawful acts." Many significant acts by Petitioners, assumed by NFO's damage expert to be unlawful and the basis of his damage computations, subsequently were found by the District Court and the Eighth Circuit to be entirely lawful. *See* Pet. at 16 n.8. Indeed, one of these lawful acts, an alleged conspiracy by milk dealers to boycott NFO, was described by NFO as the "heart" of its damage claim in Chicago. That claim was rejected by the Eighth Circuit in *NFO II*, 687 F.2d at 1199, App. F at 274. Despite being given the opportunity to do so on remand, NFO failed to make any adjustment in its damage projections to account for the impact of the many lawful acts previously assumed to be unlawful.

3. NFO erroneously states that Petitioners will be given the opportunity to litigate the issue of the effect of lawful competition on remand. Opp. at 10. NFO was afforded the opportunity on the first remand in *NFO III* to reopen the record in order to remedy its flawed damage theory, but NFO expressly declined to do so. In *NFO IV*, the Eighth Circuit expressly ordered the record closed on remand, thus precluding Petitioners the opportunity to litigate this issue. Petitioners bear the burden of attempting to correct NFO's flawed damage theory on the basis of the *existing* record.[1]

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1. When all else fails, NFO falls back upon a well-worn red-herring—destruction of documents—to avoid the important issues in this case. There are several answers to this repeated attempt at poisoning the well. First, document destruction is irrelevant to the important legal issues raised in this case. Second, the issue of document destruction was removed from the case years ago, when the District Court ruled on the matter (*NFO III*, 614 F. Supp. at 751-57; App. E at 69-82) and both NFO and AMPI were found to have destroyed documents. AMPI and NFO then settled the issue pursuant to the District Court's ruling. Third, under NFO's faulty reasoning, *Petitioners* would be entitled to an adverse inference that the documents NFO destroyed would have shown that NFO did not suffer any damages. In short, this issue is irrelevant, has been long settled and is interposed solely to create prejudice and obscure the important legal issues raised by the innovative decision of the Eighth Circuit in *NFO IV*.

CONCLUSION

For the reasons discussed in this Reply Brief and in the Petition for Writ of Certiorari, Petitioners respectfully request that a Writ of Certiorari issue to review the judgment and opinion of the Eighth Circuit in *NFO IV*.

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